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No. _____

In the
Supreme Court of the United States
October Term, 2009

DANIEL MASARIK,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the district court deny Masarik's right to present a defense by refusing to permit Masarik to introduce expert testimony on eyewitness identification?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Masarik respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's oral decision denying admission of expert testimony is unpublished. It appears in Appendix B to this petition. The decision of the United States Court of Appeals for the Seventh Circuit is reported *sub nom.* at *United States v. Bartlett*, 567 F.3d 901 (7th Cir. 2009).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on June 8, 2009. No petition for rehearing was filed in this case. No request for extension of time to file this Petition for Writ of Certiorari has been made in this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that:

> No person shall be . . . deprived of life, liberty or property, without due process of law

The Sixth Amendment to the United States Constitution provides in relevant part that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.

STATEMENT OF THE CASE

Procedural History

Daniel Masarik was charged in state court with crimes arising out of the confrontation discussed in the Statement of Facts. After his acquittal of those charges, he and his codefendants were indicted in federal court on one count of conspiring to deprive individuals of their civil rights in violation of 18 U.S.C. §241 and on one count of depriving them of their civil rights in violation of 18 U.S.C. §242.

Prior to trial, Masarik gave timely notice of his intent to call an expert in eyewitness identification to testify at trial. The government moved to exclude the expert's testimony. The district court granted the government's motion and declined to permit the expert to testify.

The case proceeded to trial against Masarik and his three remaining codefendants. The trial lasted from July 10, 2007 to July 26, 2007. Masarik was found guilty on both counts.

A judgment of conviction was entered on January 17, 2008. Masarik appealed his conviction to the United States Court of Appeals for the Seventh Circuit. The decision of the Court of Appeals was entered on June 8, 2009.

Facts

This overview of the facts focuses on the trial evidence that pertained to Daniel Masarik. It omits reference to the details of evidence against Masarik's co-defendants as that evidence is not relevant to the issues raised in Masarik's appeal.

Katie Brown and Kirsten Antonissen attended a bachelorette party on October 23, 2004. Frank Jude performed as a stripper at that party. After Jude's performance, Brown and Antonissen left the party and went to a nearby bar. After awhile they saw that Jude and his friend Lovell Harris were in the bar. Brown's friend Tina Schultz came in and invited Brown and Antonissen to a party that Andrew Spengler was hosting. As they were leaving the bar, Brown and Antonissen invited Jude and Harris to the party. The four traveled to Spengler's house soon after Schultz left the bar.

Spengler was a City of Milwaukee police officer, as were many of the guests at his party including Masarik, John Bartlett, and Ryan Packard. Jon Clausing was another off-duty police officer who attended Spengler's party. He met Masarik for the first time at the party.

Immediately after arriving at Spengler's party, Brown and Antonissen went to the bathroom, leaving Harris and Jude in the dining room. According to

Harris, after a few minutes Spengler and Bartlett came over, asked them who invited them and who they were with, and told them it was time to go. Jude testified that Spengler asked who they knew at the party. Jude pointed to Schultz. Jude felt uncomfortable so he told Brown that he wanted to leave.

Spengler's neighbor Jill Kieselhorst attended the party. Kieselhorst testified that after Jude and Harris arrived, Spengler asked whether any of them knew the new arrivals at the party. Kieselhorst saw Spengler speak to Jude. She thought Masarik was with Spengler but she was uncertain of that, and she acknowledged testifying in state court that she could not identify the man who was standing next to Spengler.

After Brown and Antonissen rejoined Harris and Jude, they all decided to leave. Kieselhorst testified that Spengler followed them outside, then came back inside and asked if anyone had seen his watch or wallet. Spengler soon announced to the party that his badge was missing. People at the party started to move outside. Kieselhorst testified that Spengler armed himself with a handgun before he went back outside.

Antonissen told Jude and Harris to get into her truck. They entered the back seat. Antonissen and Brown sat in front. Schultz came out of the house to ask why they were leaving, and Antonissen replied that she should ask her friends in the house. Spengler eventually approached the truck and said things had been fine until they arrived, but now his badge was missing.

People from the party surrounded the truck. Spengler said he was a cop, as did others in the crowd. Spengler and some others told the truck's occupants that they needed to get out of the truck. They were talking about a missing badge. Someone broke a headlight.

Harris testified that Spencer, Bartlett, and Masarik were among the people yelling at them from the porch. Harris recalled that Bartlett was yelling that his badge had been stolen. Brown identified Masarik as one of the people she saw on the street at some point that night. However, she did not remember seeing Masarik among the people who surrounded the truck. Harris testified that he saw Masarik and Packard in the group that surrounded the truck.

Brown was the first one out of the truck. When she looked back she saw Jude being pulled from the truck by two men she could not identify.

Harris testified that he was pulled out of the truck by Spengler, Bartlett and Masarik. Bartlett and Spengler searched him; Masarik was nearby. Harris also testified that the defendants, including Masarik, directed racially offensive comments toward him. Antonissen heard no comments of that nature. Neither did Jodi Kamermeyer or Maria Gagnon or Officer Martinez.

Clausing testified that he helped Bartlett pull Harris out of the truck. They patted him down but did not find a badge. Then they walked Harris down the street at knifepoint. Clausing testified that he looked back and saw Spengler, Bartlett, and Masarik questioning Jude. While he was watching them, Harris got up and ran.

Jude testified that he was pulled out of the truck. He was accused of stealing a badge and slapped. He remembered Spengler pulling him down to the ground. He next remembered being hit and punched all over.

Brown saw Jude being pushed and shoved in the street. She called 911 at 2:48 a.m. to report that observation. When Brown ended her 911 call she saw that Jude was on the ground. About five people began to punch and kick him. Brown saw Spengler and Bartlett strike Jude. Brown testified that she saw Masarik kick Jude. The confrontation continued until uniformed officers arrived.

When Antonissen called her mother at 2:46 a.m., she saw Jude being punched. She called 911 three times between 2:51 a.m. and 2:55 a.m. Antonissen could not identify anyone who was on the scene.

Clausing testified that after Harris ran, he returned to Jude, who was surrounded by Spengler, Bartlett, Mararik, and other off duty officers. As he reached the group, he saw Bartlett and another officer take Jude to the ground. He thought the second officer was Masarik but it might have been Ryan Lemke. Clausing testified that he saw Bartlett and Spengler striking Jude while officers pulled on his arm and held down his legs. Clausing saw Masarik standing by Jude's head but did not see Masarik make contact with Jude. It appeared to Clausing that Bartlett and Spengler were punching Jude in order to obtain information about the missing badge. Clausing's glasses were knocked off in the commotion.

The parties stipulated that at some point on October 24, 2004, Lemke laid across Jude's legs. Lemke also kicked Jude in the thigh twice.

Jodi Kamermeyer stayed inside Spengler's house as others were going outside. She looked for the missing badge. When she finally went outside, she saw Michele Bartlett and Spengler arguing with Jude about the missing badge. She testified that she saw Packard and Masarik hold Jude and saw Packard hit Jude in the face. She said she "misspoke" when she testified in earlier proceedings that Jude was not hit in the face.

Kamermeyer testified that the group surrounding Jude fell to the ground. She said Masarik was among those she saw punching Jude. She also testified that she saw Spengler kick Jude. In the state court trial, Kamermeyer testified that she did not see anyone kick Jude, but later said she "misspoke."

Kieselhorst also stayed inside Spengler's house. From a window she observed Jude on the ground and saw about five people striking him. She saw Spengler in that group although she did not see him strike Jude.

Maria Gagnon was in the bathroom when most of the guests went outside. When she looked outside she saw a group of people in the street surrounding a truck. She did not see Masarik in that group. She eventually saw some people pulling Jude from the truck, but she could not identify any of those persons. She saw several people punching and then kicking Jude, including Spengler. After that ended, another man put his foot on the side of Jude's head, holding his head against the ground while

Masarik kicked him in the face. Gagnon testified that she yelled at the men to stop and that Masarik came up to her and told her to shut up.

By the time Clausing retrieved his glasses, uniformed officers were arriving. Clausing said Masarik kicked Jude in the head as uniformed officers Schabel and Martinez approached. Clausing testified that Schabel also kicked Jude in the head.

Officer Nicole Martinez arrived on the scene at 3:00 a.m. with her partner Joseph Schabel. She saw a number of people running as she arrived. Some men were crowded around a body on the ground. She identified Spengler, Masarik and Bartlett among them. She did not see Spengler strike Jude but she saw Bartlett punch and kick him and hold a knife to his neck after he was handcuffed. She testified that she saw Masarik kick Jude in the crotch. She also testified that she saw Schabel punch but not kick Jude. She did not see anyone stand on Jude's head.

Schabel submitted to an internal affairs interview in November 2004. Initially, he did not identify anyone who had been near Jude. After conferring with his lawyer, he said Spengler was on Jude's left side, Masarik was on Jude's right side, Packard was on Jude's legs, and Bartlett was at Jude's head. He did not admit to engaging in any inappropriate conduct. He changed those locations when he was interviewed in February 2005. Schabel admitted that prior to trial, he had repeatedly lied under oath about Jude's beating.

At trial Schabel testified that Spengler was on Jude's left, Masarik was at his head, Packard was at his feet, and Bartlett was on his right side. As Schabel approached, he heard Spengler say Jude had

his badge. Schabel then stomped on Jude's head two or three times. Schabel saw no damage to Jude's face before he stomped on Jude's head. After he stomped on it, Schabel saw that Jude's face was badly beaten.

Schabel said he saw Masarik kick Jude in the face, then saw Bartlett kick him in the face and saw Spengler punch him in the face. Schabel testified that Bartlett took his pen while he was kneeling over Jude. Schabel did not see anyone kick Jude in the groin.

Clausing testified that he saw Schabel give Bartlett a pen and watched Bartlett insert the pen into Jude's ear. He said he saw Masarik kick Jude in the groin and saw Lemke stand on Jude's head. Clausing testified to his belief that all of them were acting as police officers during the beating.

Jude testified that he felt something shoved in his ear and that he felt somebody kicking him in the groin.

Corston Court is a police supervisor who was dispatched to the scene. After he spoke with Spengler, he recognized and spoke to Masarik, who told him he needed to get the troops out. Court saw Masarik chastising an off duty officer for grabbing a woman's behind.

Other uniformed officers who arrived at the scene and saw Jude on the ground testified that they did not see the defendants kick or strike him.

Wade Grubich, a police sergeant, arrived at the scene at about 3:30 p.m. He entered Spengler's house. A number of officers were inside, including Masarik. He ordered them to go outside. He had Masarik sit in his vehicle. He remained with

Masarik for several hours, until 10:30 or 11:00 a.m. Masarik did not appear to be intoxicated and his hands were not injured. His clothes were clean and free of blood. Grubich advised a lieutenant on the scene that Masarik was fit for duty.

To demonstrate his resemblance to Ryan Lemke, Masarik introduced photographs of himself and Lemke into evidence.

Masarik was Spengler's house guest as well as his party guest. Masarik testified that he drank five or six vodka tonics during the several hours he was at Spengler's party. Prior to the commotion that followed the departure of Jude and Harris from the party, Masarik entered a quiet room to make a telephone call to his wife. He was accompanied by his friend Rob Engle. Telephone records confirm that the call began at 2:38 a.m. Almost immediately after that call ended, Masarik's wife called him back. That call ended at 2:48 a.m.

Masarik talked to Engle for a few minutes before returning to the party. When he looked into the living room he saw that most of the guests were gone and the rest of them were leaving. Masarik followed the last of them out the front door. He encountered Spengler on the porch. Masarik asked Spengler why everyone was leaving. Spengler said his badge had been stolen. Spengler told Masarik he should check to see if any of his things had been stolen.

Following Spengler's advice, Masarik went back into the house. His police equipment and other belongings were in the bedroom he had been using. He wanted to account for his gun, badge, handcuffs, and other equipment. It took him several minutes to

find the shirt to which his badge was pinned. He eventually accounted for all of his property except his memo book.

Masarik eventually went outside and found Spengler on the sidewalk. He told Spengler that his memo book was missing. Spengler told Masarik that he'd placed Masarik's memo book inside the desk in the bedroom. As Masarik spoke to Spengler he saw that people were moving from the sidewalk into the street. People were moving in all directions.

Masarik went back into the house to make sure he could account for his memo book. He found it in the desk in his room. He secured the memo book with his other police equipment, satisfying himself again that he could account for all of his equipment. Masarik stayed in his room for a few minutes. When he came back outside, he saw that people had formed into groups. He saw Packard in a group by a truck. He saw Bartlett standing seven feet away from Packard.

As Masarik left the porch and entered the street, he saw that two uniformed officers were lifting Jude up from the ground. Masarik saw that Sgt. Court was on the scene. Since Court was the supervising officer, Masarik checked in with him. Bartlett was also approaching Court. Court told them to "make the yards," meaning they should search the yards for the missing badge. They did so for about 15 or 20 minutes. Masarik moved his car, then returned to the Spengler house and awaited further instructions. Eventually he was ordered into Grubich's vehicle. He spent the next several hours with Grubich.

Masarik testified that he did not see Brown, Antonissen, Jude, or Harris at the party. He did not interact with them and did not see them leave. Masarik denied punching, kicking, restraining, or having any physical contact with Jude. He denied doing anything to help any other person restrain or strike Jude.

Prior to trial Masarik gave notice of his intent to present the testimony of Dr. Otto H. MacLin, an expert on eyewitness identification. The government objected to this testimony, and moved to exclude it. The district court granted this motion, and Masarik was unable to present the testimony of Dr. MacLin at his trial. Since Dr. MacLin had previously testified in the state court trial, Masarik was able to present an offer of proof, in the form of a transcript Dr. MacLin's testimony from the state court trial. If Dr. MacLin had been allowed to testify, he would have presented the following evidence.

The first attempt at identification is the most important. If an individual looks at a picture of the defendant in a photo array and does not identify that picture, that non-identification is the most reliable evidence of whether the defendant's face is in the witness' memory. Seeing the defendant's picture in the photo array can influence or taint subsequent attempts at identification. If the witness sees the defendant or the defendant's image in a subsequent setting, the witness is more likely to identify the defendant because the defendant's image will have been planted in the witness' memory during the first viewing.

Any post-event information that a witness acquires can taint the witness' identification,

including reading about the crime or seeing a suspect's picture in the newspaper or in other media coverage. Exposure to that kind of post-event information can influence or alter the witness' memory.

Although eyewitnesses commonly feel that they have the ability to separate the experience of seeing the defendant in a prior photograph from the experience of seeing the defendant at the crime scene, research shows that the brain actually has great difficulty in keeping those events separated.

When eyewitnesses talk to each other about their observations and experiences, their post-event sharing of information can create new memories that become inseparable from the original event.

In a classic example, when witnesses to a staged but unexpected crime were told that the victim couldn't describe the criminal except for his crooked nose, the witnesses were likely to include "crooked nose" in their own descriptions even though the description was inaccurate.

Memories decay over the course of time. As that happens, the brain is likely to replace actual memories with post-event information that the brain has acquired.

Because our peripheral vision is blurry, our brains process small pieces of a visual field that is in rapid motion. While this gives us a larger visual experience, we can't take in every detail at once. In a calm setting, our eyes can dart around and take in information fairly easily. In a chaotic setting, however, with a lot of action vying for our attention, the brain is more likely to make interpretational

errors as it attempts to process the information that the eyes are seeing.

An eyewitness' confidence in his identification is likely to increase over time but the accuracy of that memory does not improve. Confidence in a memory is not correlated with the accuracy of that memory. There is not a strong relationship between an eyewitness' confidence and an identification's accuracy.

Police officers are no better than other eyewitnesses at identifying and remembering faces, and they are just as susceptible to cross-racial identification bias.

Asked specifically about a hypothetical witness who has seen a photo array containing the defendant's picture on more than one occasion without identifying the defendant, who has been exposed to pretrial publicity about the defendant without identifying him, and who first identifies the defendant after seeing him in court, MacLin testified the he would not "put a lot of stock" in a memory formed under those circumstances.

REASONS FOR GRANTING THE WRIT

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed. 1149 (1967). Given the danger of wrongful conviction based upon erroneous eyewitness identification, expert testimony regarding the accuracy of eyewitness identification is an essential safeguard against wrongful convictions. By upholding the

exclusion of expert testimony in Masarik's case, the Court of Appeals for the Seventh Circuit has decided an important federal question in a way which conflicts with relevant decisions of this Court and of other United States Courts of Appeals. Masarik's Petition for Writ of Certiorari should therefore be granted to resolve this conflict.

Eyewitness evidence is peculiarly powerful. "Of all the evidence that may be presented to a jury, a witnesses' in-court statement that 'he is the one' is probably the most dramatic and persuasive" *United States v. Russell,* 532 F.2d 1063, 1067 (6th Cir. 1976). Until relatively recently, courts have often assumed that jurors share a lawyer's or judge's appreciation of the risk that an eyewitness' identification is mistaken, and that the causes of misidentification are matters of common sense that are well understood by the average person. A growing body of research undermines these assumptions. Psychologists have determined that most people do not understand the substantial risks of misidentification that is inherent in eyewitness testimony. "Jurors tend to overestimate the accuracy of eyewitness identifications because they often do not know the factors they should consider when analyzing this testimony." *United States v. Smithers,* 212 F.3d 306, 312, n. 1 (6th Cir. 2000), *citing* Roger V. Handberg, *Expert Testimony on Eyewitness Identification: a New Pair of Glasses for the Jury,* 32 AM. CRIM. L. REV. 1013,1018-22 (1995). Data gathered by social scientists supports the conclusion that "jurors are unaware of several scientific principles affecting eyewitness identifications." *Id.*

Innocent defendants are convicted when jurors are not educated about the frequency and causes of mistaken eyewitness identification. "One study has estimated that half of all wrongful convictions result from false identifications." *Smithers,* 212 F.3d at 312, n. 1 *citing* Elizabeth F. Loftus, *Ten Years in the Life of an Expert Witness,* 10 LAW HUM. & BEHAV. 241, 243 (1986). This is not the result of false testimony, but rather, it is caused by "sincere, yet woefully inaccurate eyewitness identifications." *Id.*

With the advent of readily available DNA testing there now exists a growing ability to objectively demonstrate the "overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications." *United States v. Brownlee,* 454 F.3d 131, 141-142 (3rd Cir. 2006). The Innocence Project, a well-known organization specifically devoted to uncovering and overturning wrongful convictions, estimates that eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions which have been overturned through subsequent DNA testing. The Innocence Project – Understand the Causes: Eyewitness Misidentification, *available at* http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php.

Masarik's case perfectly illustrates this issue. At Masarik's state court trial, Dr. MacLin was permitted to testify concerning eyewitness identification, and Masarik was acquitted. In the federal case, with identical facts, but without Dr. MacLin's testimony, Masarik was convicted. Had Dr. Maclin been permitted to testify, he would have been

able to explain why the witnesses may have misidentified Masarik.

Four of the witnesses (Brown, Harris, Gagnon and Martinez) had viewed a photo array which contained a photo of Masarik. None of these witnesses had identified Masarik at their first opportunity, which was when they observed his likeness in the photo array. It was only after talking to others or after exposure to extensive news coverage that they identified Masarik for the first time at Masarik's state court trial, at which point it would hardly have been difficult to figure out who the defendant was. Dr. MacLin would have been able to explain why this fact pattern raised doubts as to the accuracy of the identifications. Dr. MacLin would have also been able to explain that an eyewitness' certainty is not correlated to accuracy. The problem of misidentification was exacerbated in Masarik's case because of his physical resemblance to another defendant, Lemke. In fact, at Masarik's state court trial, one witness mistakenly identified Masarik as having kicked one of the victims, when in fact it was clear that the witness had actually seen Lemke do this.

Two of the remaining three eyewitnesses were police officers, and Dr. Maclin's testimony would have assisted the jury in understanding their testimony by explaining that their training and experience as police officers would not enhance the reliability of their eyewitness identifications.

One of these three remaining witnesses (Kamermeyer) admitted to being intoxicated, conceded that her observations were made in the dark from a distance of fifty or sixty feet, and

erroneously referred to Masarik as "Jon" when she identified his photograph.

The other two eyewitnesses (Clausing and Schabel) had entered into plea agreements which required them to cooperate with government. Clausing admitted to repeatedly lying to try and keep his job as a police officer, and admitted that he had watched news coverage and some of the state court trial on television, even though he had been sequestered, and Schabel admitted lying under oath repeatedly in the state court proceedings.

In short, in Masarik's case, as in *Smithers*, the conclusion of the district court and the court of appeals that Masarik's jury would not have benefited from Dr. MacLin's expert testimony was simply wrong. Dr. MacLin's testimony would have educated the jury about a significant body of scientific knowledge that the jury needed in order to set aside the common sense, but mistaken, belief that eyewitness identifications are normally accurate, that the extent of that accuracy is correlated with the certainty of the identification, and that police officers in particular have special training and experience which would enhance the reliability of their identifications.

By upholding the denial of Masarik's request to present the testimony of Dr. MacLin, the court of appeals upheld the denial of Masarik's Fifth and Sixth Amendment right to present a defense. A defendant's right to present witnesses in his own defense is fundamental. *Taylor v. Illinois,* 484 U.S. 400, 408, 108 S.Ct. 646, 98 L.Ed. 2d 298 (1988). Since few rights are more fundamental, any exclusion of evidence that obstructs the right to present a witness

must comport with due process. *Id.* The application of an evidentiary rule to exclude relevant evidence violates due process when it is disproportionate to the ends the rule is meant to serve. *United States v. Scheffer,* 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed. 2d 413 (1998). When that exclusion of relevant evidence deprives the accused a fair opportunity to present his defense, that exclusion is disproportionate, and therefore violates the defendant's rights. *Ferensic v. Birkett,* 501 F.3d 469, 475-476 (6th Cir. 2007). In particular, disproportionality exists when the testimony of the eyewitness identification expert would not be prejudicial to the prosecution, but its exclusion would be harmful to the defense. *Ferensic,* 501 F.3d at 478. Absent a showing a prejudice to the government, the decision to exclude the testimony of an eyewitness identification expert "raises an inference of arbitrariness" *Id.*

When expert testimony is capable of creating a reasonable doubt that would not otherwise exist, its exclusion is constitutional error. *Howard v. Walker,* 406 F.3d 114, 132 (2nd Cir. 2005). Dr. MacLin's testimony was certainly capable of creating a reasonable doubt as to the reliability and accuracy of the eyewitnesses. With the benefit of Dr. Maclin's testimony, Masarik was acquitted in state court on the same set of facts as presented in his federal prosecution.

The refusal of the Court of Appeals for the Seventh Circuit to overturn Masarik's conviction, and provide him with his constitutionally guaranteed opportunity to present a complete defense at a new trial, was consistent with that Circuit's "line of cases

which reflect . . . disfavor of expert testimony on the reliability of eyewitness identification." *United States v. Hall,* 165 F.3d 1095, 1104 (7th Cir. 1999). This approach is in direct conflict with that taken in other circuits. For example, the Third Circuit has concluded that witnesses, such as experts who testify regarding the vagaries of eyewitness identification, who can bring "reliable scientific expertise" to bear upon "pertinent aspects of the human mind and body should generally, absent explicable reasons to the contrary, be welcomed by federal courts, not turned away." *United States v. Mathis,* 264 F.3d. 321, 340 (3rd Cir. 2001). After exhaustively canvassing the scientific research regarding eyewitness identification, this position was forcefully reaffirmed by the Third Circuit in *United States v. Brownlee,* 454 F.3d 131 (3rd Cir. 2006).

The Sixth Circuit has acknowledged the necessity of permitting a defendant to present expert testimony on factors bearing upon the reliability of eyewitness identification, *United States v. Smithers,* 212 F.3d 306 (6th Cir. 2000), and has now gone so far as to assert that the reliability of expert testimony regarding eyewitness identification should be met with "near-universal acceptance." *Ferensic,* 501 F.3d at 478.

After reviewing the authorities pro and con from other courts of appeals, the Fifth Circuit has concluded that it accepts the "modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper." *United States v. Moore,* 786 F.2d 1308, 1312 (5th Cir. 1986). In so doing, the court pointed out that "The scientific validity of the studies confirming the many

weaknesses of eyewitness identification cannot be seriously questioned at this point." *Id.* The court identified several specific aspects of expert testimony on eyewitness reliability which apply directly to Masarik's case, thereby demonstrating that "Expert testimony on eyewitness reliability is not simply a recitation of facts available through common knowledge." *Id.* Some of these factors are the erroneous, but common belief that the accuracy of a witness' recollection increases with the certainty of the witness; that witnesses remember better when they are under stress, although the opposite is actually true; and that a group consensus among witnesses as to an alleged criminal's identity is far more likely to be inaccurate than is an individual identification, due to feedback between members of the group, (in direct contradiction of the conclusion of the Seventh Circuit in Masarik's case). *Id.*

Other courts of appeals have adhered to the traditional approach endorsed by the Seventh Circuit, whereby expert testimony on eyewitness identification is routinely excluded, generally on the basis that it does not assist the jury in evaluating eyewitness testimony. *See, e.g., United States v. Rodriguez-Berrios,* ___F.3d___, 2009 WL 2184551 (1st Cir. 2009), *United States v. Harris,* 995 F.2d 532 (4th Cir. 1993), *United States v. Martin,* 391 F.3d 949 (8th Cir. 2005), *Barker v. Fleming,* 423 F.3d 1085 (9th Cir. 2005), *United States v. Rodriguez-Felix,* 450 F.3d 1117 (10th Cir. 2006).

At least one circuit, the Eleventh, has gone so far as to endorse a blanket rule prohibiting any use of expert testimony regarding eyewitness reliability.

United States v. Smith, 122 F.3d 1355 (11th Cir. 1997).

There currently exists a direct conflict between those courts of appeal which endorse modern science regarding the perils of eyewitness identification and therefore favor the admissibility of expert testimony on this subject, and those which, like the Seventh Circuit, remain rooted in the past and disfavor this testimony, or ban it outright. Depriving a defendant of the right to present an effective defense on this crucial issue will only result in more convictions of the innocent. This Court should accept review of Masarik's case to resolve this conflict between the courts of appeals, and to assure the vindication of this important right.

CONCLUSION

For the foregoing reasons, Masarik's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 08-1196, 08-1197 & 08-1198

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JON BARTLETT, ANDREW R. SPENGLER, and DANIEL MASARIK,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 06-CR-273 - **C.N. Clevert, Jr.**, *Judge*.

ARGUED MAY 15,2009 - DECIDED JUNE 8,2009

Before EASTERBROOK, Chief Judge, and BAUER and ROVNER, Circuit Judges.

EASTERBROOK, Chief Judge. The distance between civilization and barbarity, and the time needed to pass from one state to the other, is depressingly short. Police officers in Milwaukee proved this the morning of October 24, 2004.

Andrew Spengler held a housewarming party that started on October 23 and lasted into the next

morning. Spengler and many guests were police officers. Liquor flowed freely. Katie Brown and Kirsten Antonissen were among the invitees. They arrived after 2:30 AM on October 24 with Frank Jude and Lovell Harris. The quartet was immediately made to feel unwelcome because the women are white, and the men are not. (Harris describes himself as black; Jude describes himself as bi-racial.) After five minutes, the four prepared to leave - but they were prevented when at least ten men stormed outside, surrounded Antonissen's truck, and demanded to know what the four new arrivals had done with Spengler's badge. Spengler says that he could not find it after the quartet arrived, and he accused them of theft. The men demanded that the four get out of the truck and surrender the badge. When they stayed inside, the men threatened them ("Nigger, we can kill you") and began to vandalize the truck. Harris tried to wake the neighbors; the men responded: "Nigger, shut up, it's our world."

Eventually all four were dragged from the truck. A search did not turn up the badge. Instead of concluding that Spengler's accusation was mistaken, the men became enraged and violent. One cut Harris's face in a way that he described as "slow and demented." Harris managed to free himself and run away. Multiple men began to kick and punch Jude. Antonissen managed to call 911; she told the operator "they're beating the shit out of him." When the men saw Antonissen use the phone, they wrestled it from her hand and flung her against the truck so forcefully that its metal was dented. Brown made two calls to 911 before her phone, too, was seized.

The first call was logged at 2:48, and two officers (Joseph Schabel and Nicole Martinez) arrived at 3:00. The beating continued until their appearance. Men punched Jude's face and torso; when he fell to the ground, they kicked his head and thighs. The partygoers behaved as a mob. Not a single person in the house tried to stop the attack or even to call for aid. Jon Clausing, who had slashed Harris's face, explained his conduct as "just kind of going along with everybody." That is the way of the mob. Society has police forces to pose a counterweight to mobs, yet here the police became a mob.

Schabel and Martinez were on duty and had not been drinking, so they should have put a stop to the violence. Instead Schabel joined it, while Martinez watched. On being told that Jude had stolen Spengler's badge, Schabel called Jude a "motherfucker" and stomped on his face until others could hear bones breaking. After telling Martinez "I'm really sorry you have to see this," Daniel Masarik picked Jude off the ground and kicked him in the crotch so hard that his body left the ground. Jon Bartlett then took one of Schabel's pens and pressed it into each of Jude's ear canals, causing severe injury and excruciating pain. The men also broke two of Jude's fingers by bending them back until they snapped. Spengler put a gun to Jude's head and said: "I'm the fucking police. I can do whatever I want to do. I could kill you." Bartlett used a knife to cut off Jude's jacket and pants, leaving him naked on the street in a pool of his own blood.

The violence tapered off when additional on-duty police arrived. At 3:09 officers arrested Jude.

Yes, they arrested the victim, although Jude had never fought back. (He had suffered a concussion and was unable to defend himself.) Jude was taken to an emergency room; the admitting physician took photographs because "[t]here were too many [injuries] to document" in writing. The injuries to Jude's ears could not be diagnosed because the physicians could not control the bleeding. One physician testified that she had never seen ear injuries so severe. While Jude was receiving treatment, on-duty officers recovered Jude's car. Bartlett and other men had ripped up its seats with knives and poured antifreeze over them; apparently they poured antifreeze into the gas tank too, damaging the engine. The radio had been wrecked. The men broke a headlight and tore a mirror off Antonissen's truck. Spengler's badge was not found in either the car or the truck; perhaps he had put down the badge in the house and was too soused to remember where.

Bartlett, Spengler, and Masarik were prosecuted in state court and acquitted after Schabel and others committed perjury on their behalf, while many people who had been at the party claimed to suffer memory loss. That made it impossible to show who had done what, and the judicial system (unlike a mob) demands personal responsibility. The Civil Rights Division of the Justice Department then investigated, and federal prosecutors persuaded several witnesses to cooperate. Four men (Joseph Schabel, Ryan Lemke, Jon Clausing, and Joseph Stromei) pleaded guilty to obstruction of justice (by perjury, including false testimony before the federal grand jury), to violating Harris's and Jude's civil

rights, or both. Bartlett, Spengler, and Masarik were convicted by a jury of conspiring to violate Harris's and Jude's right to be free from unreasonable searches and seizures (18 U.S.C. §241), and of the substantive offense (18 U.S.C. §242). (Excessive force in making an arrest violates the fourth amendment to the Constitution, applied to state police officers by the fourteenth amendment. See *Graham v. Connor*, 490 U.S. 386 (1989).) Bartlett was sentenced to 208 months' imprisonment, Spengler and Masarik to 188 months apiece. All seven men have been fired by the Milwaukee Police. Two more officers were fired but later reinstated; an additional four were disciplined.

Bartlett, Spengler, and Masarik present twelve appellate issues. Only four require discussion. The rest have been considered, and we reject them without comment.

1. The maximum punishment for a violation of either §241 or §242 is 120 months' imprisonment. The longer sentences that Bartlett, Spengler, and Masarik received depend on convictions of both offenses. All three contend that the evidence of conspiracy is insufficient. Conspiracy is agreement to violate some other law, see *United States v. Shabani*, 513 U.S. 10 (1994), and defendants maintain that events developed without an agreement. When Spengler called for aid to recover his badge, people rushed from the party to Antonissen's truck without prior negotiation or agreement.

This perspective assumes that the agreement must predate the first substantive offense. Yet it need not. An agreement forged in the course of committing a crime, among people who plan to work together in an ongoing criminal venture, is no less a

conspiracy than one that precedes the first overt act. The battery of Jude lasted for 20 minutes. A reasonable jury could infer that defendants and others formed a plan to do whatever was necessary to recover Spengler's badge and punish the thief – a plan carried out through cooperative criminal activity. Working together to commit a series of criminal acts, in which each cooperative act implies a plan to cooperate in the future, is a functional understanding of conspiracy. See *United States v. Lechuga*, 994 F.2d 346 (7th Cir. 1993) (en banc); *United States v. Wantuch*, 525 F.3d 505, 519 (7th Cir. 2008). None of the evidence suggests that defendants worked at cross-purposes with each other, or with the rest of the mob. The evidence is enough to permit an inference of agreement and thus a conviction for conspiracy.

2. Masarik contends that he did not participate in the beating. He concedes that he was at the party but says that he stayed indoors or on the mob's periphery. He did not report the crime or assist the prosecution, so he might have been convicted of misprison of felony, see 18 U.S.C. §4, but if he was a bystander he did not violate §241 or §242.

Six witnesses testified that Masarik held Jude while others punched and kicked him. Some of these witnesses testified that Masarik kicked Jude in the face at least twice, and that Masarik kicked Jude in the crotch (after apologizing to Martinez). Masarik contends that he must have been confused with someone else, and he proposed to present expert testimony about high error rates in eyewitness identifications. The district court excluded the proposed testimony for two principal reasons. First,

the judge stated that jurors could determine the reliability of identifications using the evidence from direct and cross examinations. Second, the judge invoked Fed. R. Evid. 403, which allows the exclusion of evidence that is needlessly cumulative or will consume trial time out of proportion to its value.

The first of these reasons is weak. Doubtless lawyers will ask questions designed to assist the jurors in evaluating whether a witness is telling the truth. But the problem with eyewitness testimony is that witnesses who think they are identifying the wrongdoer - who are credible because they believe every word they utter on the stand - may be mistaken. Study after study has shown very high error rates in the identification of strangers. See, e.g., Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* (3d ed. 1997) (collecting studies); Elizabeth F. Loftus, *Eyewitness Testimony* (1979; rev. ed. 1996); Daniel L. Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers* 112-37 (2001). "An important body of psychological research undermines the lay intuition that confident memories of salient experiences ... are accurate and do not fade with time unless a person's memory has some pathological impairment. . . . The basic problem about testimony from memory is that most of our recollections are not verifiable. The only warrant for them is our certitude, and certitude is not a reliable test of certainty." *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 296-97 (7th Cir. 1990) (citations to the scholarly literature omitted).

It will not do to reply that jurors know from their daily lives that memory is fallible. The question that social science can address is how fallible, and thus how deeply any given identification should be discounted. That jurors have beliefs about this does not make expert evidence irrelevant; to the contrary, it may make such evidence vital, for if jurors' beliefs are mistaken then they may reach incorrect conclusions. Expert evidence can help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are correct. Many people believe that identifications expressed with certainty are more likely to be correct; evidence that there is no relation between certitude and accuracy may have a powerful effect.

Still, using expert testimony to explore this question may sidetrack a trial. A judge must balance the benefits of illuminating evidence against the costs of collateral inquiries. That's why Rule 403 grants discretion to the trial judge - and why we have held, many times, that a trial court does not abuse its discretion by excluding expert evidence about the reliability of eyewitness testimony. See, e.g., *United States v. Carter*, 410 F.3d 942, 950 (7th Cir. 2005) (collecting cases); *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999) (same).

The district judge did not abuse his discretion in this case, because the conviction does not rest on identifications by Jude and the other victims. Only two of the people who identified Masarik were strangers to him. The other four knew him well. The social-science studies do not suggest that people who have known one another for weeks or years are apt to err when identifying them in court. What's more, the

scholarly work concerns identification by single eyewitnesses, not the probability of error when multiple witnesses identify the same person. If the six in-court identifications of Masarik were independent, and each had a probable error rate of .333 (that is, there is a one-in-three chance that any witness was mistaken), then the probability that Masarik is innocent is .333 to the sixth power, or well under 1. We have remarked before that the scholarly findings about eyewitnesses have only limited application when multiple witnesses identify the same person. See *United States v. Williams*, 522 F.3d 809 (7th Cir. 2008); *Newsome v. McCabe*, 319 F.3d 301 (7th Cir. 2003). Masarik did not proffer any evidence about the error rates in six-fold identifications. Nor did he propose to ask an expert whether the six identifications should be regarded as independent, or what the risk of error in these identifications taken jointly is apt to be. Someone who proposes expert testimony must show how the findings apply to the litigation at hand; Masarik did not do this.

A concurring opinion in Hall added that, although jurors should be made aware of the scholarly findings in appropriate cases, it is often better to have the judge summarize the state of knowledge than to have a parade of experts. 165 F.3d at 1120. Masarik did not ask the judge to recap the scholarly findings for jurors' benefit. For him, it was an expert on the stand or it was nothing; the judge did not abuse his discretion in blocking that testimony in order to keep this trial on track.

3. All three defendants contend that their sentences are unreasonably high when evaluated under the criteria in 18 U.S.C. §3553(a). They stress §3553(a)(6), which requires a sentencing judge to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct". Lemke, Clausing, Schabel, and Stromei all received sentences considerably less than 188 months; Bartlett, Spengler, and Masarik contend that this difference makes their sentences unreasonably high.

We have encountered this argument before and rejected it.

> There would be considerably less cooperation - and thus more crime - if those who assist prosecutors could not receive lower sentences compared to those who fight to the last. Neither [United States v.] *Booker*[, 543 U.S. 220 (2005)] nor §3553(a)(6) removes the incentive for cooperation - and because this incentive takes the form of a lower sentence for a cooperator than for an otherwise-identical defendant who does not cooperate, the reduction cannot be illegitimate. After all, §3553(a)(6) disallows "unwarranted sentence disparities" (emphasis added), not all sentence differences.
>
> [T]he kind of "disparity" with which §3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case. If

> the national norm for first offenders who gain $275,000 or so by fraud is a sentence in the range of 33 to 41 months, then system-wide sentencing disparity will increase if Boscarino's sentence is reduced so that it comes closer to Aulenta's. Instead of one low sentence, there will be two low sentences. But why should one culprit receive a lower sentence than some otherwise-similar offender, just because the first is "lucky" enough to have a confederate turn state's evidence? Yet that is Boscarino's position, which has neither law nor logic to commend it.
>
> Sentencing disparities are at their ebb when the Guidelines are followed, for the ranges are themselves designed to treat similar offenders similarly. That was the main goal of the Sentencing Reform Act. The more out-of-range sentences that judges impose after Booker, the more disparity there will be. A sentence within a properly ascertained range therefore cannot be treated as unreasonable by reference to §3553(a)(6).

United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006). Defendants acknowledge that the circuit's law is against them, but they contend that we must reevaluate the subject in light of *Rita v. United States*, 551 U.S. 338 (2007), *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007), which emphasized that the

Guidelines are not binding and that district judges have considerable discretion to implement their own conceptions of just sentences, notwithstanding the Sentencing Commission's views. See also *Spears v. United States*, 129 S. Ct. 840 (2009); *Nelson v. United States*, 129 S. Ct. 890 (2009).

To address defendants' contention, we must separate two questions: first, does §3553(a)(6) require a judge to reduce anyone's sentence below the Guideline range because other persons who committed the same crime but pleaded guilty and cooperated received lower terms?; second, does §3553 as a whole permit a judge to go below the Guideline range for this reason?

The first of these questions received a negative answer in *Boscarino* and similar cases, which have observed that §3553(a)(6) addresses only "unwarranted" disparities. A difference justified by the fact that some wrongdoers have accepted responsibility and assisted the prosecution, while others have not, is not "unwarranted." The best way to curtail "unwarranted" disparities is to follow the Guidelines, which are designed to treat similar offenses and offenders similarly. Far from disapproving this understanding, the Supreme Court adopted it in *Gall*:

> Section 3553(a)(6) requires judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The Court of Appeals stated that "the record does not show that the district court considered whether a

> sentence of probation would result in unwarranted disparities." 446 F.3d at 890. As with the seriousness of the offense conduct, avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges. Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he *necessarily* gave significant weight and consideration to the need to avoid unwarranted disparities.

128 S. Ct. 586, 599 (emphasis added). A sentence within a Guideline range "necessarily" complies with §3553(a)(6). But there is more to §3553 than §3553(a)(6). A judge must respect all of the statutory criteria in order to mete out a sentence "sufficient, but not greater than necessary, to comply with the purposes [of sentencing] set forth in paragraph (2) of this subsection." 18 U.S.C. §3553(a). The Court held in *Kimbrough*, and reiterated in *Spears*, that a judge need not accept the Sentencing Commission's penological framework. The court may adopt its own. It follows that §3553 permits a judge to reduce one defendant's sentence because of another's lenient sentence – not *because of* §3553(a)(6), but *despite* it. Avoiding "unwarranted" disparities (as the Sentencing Commission or a court of appeals defines them) is not the summum bonum in sentencing. Other objectives may have greater weight, and the court is free to have its own policy about which differences are "unwarranted." It follows that, if the district judge thought himself forbidden to take account of Lemke's, Clausing's, Schabel's, or

Stromei's (relatively) low sentences when deciding what punishment to impose on Bartlett, Spengler, or Masarik, he was mistaken. The judge did not make this error, however. He concluded that the disparity is justified by material differences in the offenders' conduct and acceptance of responsibility, not that a disparity is unjustified but irremediable. The district judge followed §3553(a), and understood the extent of his discretion, when sentencing Bartlett, Spengler, and Masarik.

4. Masarik was sentenced at the top of his range (151 to 188 months); that sentence is reasonable under §3553 and *Rita*. See also *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) (an in-range sentence is presumed reasonable on appeal). Spengler's sentence of 188 months exceeds the top of his range (121 to 151 months) but is reasonable under *Gall*: the district judge properly deemed him the instigator. Some of his conduct, such as pointing a gun at Jude's head and proclaiming authority to kill anyone he wanted, was not taken into account in the Guidelines calculation.

Bartlett's sentence of 208 months likewise exceeds the top of his range. He committed the most brutal acts. Thrusting a pen into a person's ear canals is torture by any definition. While facing the state charges, Bartlett threatened to blow up his former police station, a crime for which he has been convicted in state court and sentenced to 54 months. He also defrauded a gun dealer into selling him a submachine gun, violating gun-control laws as well as the terms of his federal bail; this conduct drew another 18 months in a separate prosecution. A district judge might deem a lengthy consecutive

sentence essential for incapacitation as well as deterrence and desert. But the court may not have appreciated that Bartlett's sentence exceeds his Guideline range.

Many cases in this circuit say that sentences exceedingthe Guideline range must be explained not only in absolute terms, under the criteria of §3553(a), but also with an analysis of why a Guideline sentence would be insufficient. See, e.g.. *United States v. Gordon*, 513 F.3d 659, 666 (7th Cir. 2008); *United States v. Wachowiak*, 496 F.3d 744, 749-50 (7th Cir. 2007). These decisions did not survive Nelson, which holds that district judges need not - indeed must not - begin with a presumption in favor of a Guideline sentence. If there is no need to start from the perspective that an in-range sentence usually is best, there is also no need to explain why some different sentence is better. The judge's task is to choose a reasonable sentence. The court must take the Sentencing Commission's views into account, but a sentence cannot be called "unreasonable" just because the judge explains why he chose that sentence, rather than explaining his decision from the Guidelines' perspective. The old regime of "departures" is defunct. See *Irizarry v. United States*, 128 S. Ct. 2198 (2008).

Although the judge need not use the Guidelines as the fulcrum of analysis, the court still needs to understand the relation between the Guidelines and the ultimate sentence. Both *Rita* and *Gall* say that the court must construct a Guideline range accurately. A sentence is procedurally unreasonable if the judge thinks it within the range, but it isn't - either because the range was not

determined accurately in the district court, or because the judge misunderstood what that range was.

Bartlett's range is 151 to 188 months. Much of the sentencing transcript reads as an explanation about why the sentence is at the high end of the range. At the end of the proceeding, the judge stated bluntly that the sentence would be the top of the range. But the actual sentence of 208 months is 20 months higher. That's a problem.

The prosecutor says that, by the close of the proceeding, the judge had recognized that 208 months exceeds Bartlett's range. The transcript is not as clear to us as it appears to be to the prosecutor. Given the risk of confusion, the better part of wisdom is to ask the district judge to take another look, to ensure that the sentence rests on a deliberate choice rather than a mistake. A 208-month sentence is reasonable substantively, but no one, not even a Bartlett, should lose 20 months of freedom because a district judge read across the wrong line in a table. (The range 168 to 210 months is the next highest in the Guidelines' sentencing table.)

Nonetheless, the prosecutor maintains, Bartlett forfeited any opportunity for appellate relief because he did not "object" to the 208-month sentence on the ground that it exceeds the Guideline range. We put "object" in scare quotes because remonstration with the judge is not an objection as usually understood. Both the Rules of Evidence and the Rules of Criminal Procedure require a litigant to make known the position it advocates and to present evidence and argument for that position. These steps

are essential to facilitate intelligent decision in the district court. Counsel present positions, and judges then decide. But the rules do not require a litigant to complain about a judicial choice after it has been made. Such a complaint is properly called, not an objection, but an exception. The rule about exceptions is explicit: "Exceptions to rulings or orders of the court are unnecessary." Fed. R. Crim. P. 51 (a). Rule 51(b) adds that a litigant preserves a contention for review "by informing the court [before the decision is made] of the action the party wishes the court to take . . . and the grounds for" that action. Bartlett and his lawyer argued for a lower sentence, and they gave reasons. They have preserved their appellate options.

Having said this, we must acknowledge that some of our opinions use the word "objection" in the same way the prosecutor did, and they hold (or at least suggest) that lawyers must ask a judge to reconsider the sentence (or other decision) as the price of appellate review. See, e.g., *United States v. Harvey*, 232 F.3d 585, 587 (7th Cir. 2000); *United States v. Marvin*, 135 F.3d 1129,1135 (7th Cir. 1998). These decisions do not discuss Rule 51(a), and for the most part they did not need to; they are compatible with Rule 51 (b), which (in language that we did not reproduce above) requires a protest immediately after the ruling if the litigant did not have an opportunity to argue the point earlier. When the judge surprises counsel, it is far better to air and resolve the matter in the district court than to bypass available opportunities for correction and save the issue for appeal. But when an issue is argued before the judicial ruling, counsel need not take exception

once the court's decision has been announced. That's what Rule 51(a) says. Bartlett's sentence was the subject of extensive argument and evidence; his lawyer did not need to argue with the judge once the sentence had been pronounced.

All three convictions, and the sentences of Spengler and Masarik, are affirmed. Bartlett's sentence is vacated, and his case is remanded for proceedings consistent with this opinion.

APPENDIX B

THE COURT: Does anyone else on the defense side wish to be heard?

At this juncture it's the decision of the Court not to allow this witness to testify. Several points should be made. First, I'm not satisfied that this witness will be testifying based upon factors that can be tested, that this witness will satisfy the requirements for proffering so-called expert testimony for a jury.

Certainly the witness would be offering testimony to assist the jury, but jurors are constantly required to assess the credibility of various witnesses and can determine based upon direct and cross examination whether or not a witness is to be believed.

Additionally, the defendant has indicated that approximately 45 minutes would be consumed by direct examination, an untold amount of time would be consumed by cross examination. And if this witness is allowed to testify it would certainly open the door to additional testimony from the government from someone who might have similar credentials. That, too, will consume trial time.

I don't see in balancing the interests of the defense and the government that it's necessary or appropriate to have the defense offer a so-called expert and the government to offer a so-called expert with respect to matters that a jury can assess based upon the direct and cross examination of the various witnesses and those persons whose identification of one or more of the defendants or others with regard to their testimony in this trial.

Ordinarily people can be questioned about the circumstances of their identification. People can be questioned regarding their sobriety and the conditions that existed at the time of various identifications. People can be examined with respect to whether or not they viewed photo arrays or had opportunities to see various people who were involved in a case.

An expert does not really lend that much more to the trial when he or she testifies that people are affected by the number of times they see a particular person or the things that may have occurred on or about the time of the incident at issue.

And so in my view given all the factors that have been discussed in the submissions by the party and the matters which have been discussed today, it would not be appropriate for this Court to open the door to extensive examination and cross examination of a witness whose testimony really does nothing more than tell the jury what the jury is required to do. That is, scrutinize the facts and circumstances that have a bearing on a witness's testimony.